92-1153

No.

Supreme Court, U.S.
FILED
DEC 14 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1992

JOSEPH JAY PICKREL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Shaun S. McCrea
McCREA, P.C.
Attorneys at Law
1147 High Street
Eugene, OR 97401-3270
(503) 485-1182
Of Attorneys for Petitioner
Joseph Jay Pickrel

73pp

QUESTIONS PRESENTED FOR REVIEW

1) Was a substantial portion of the facial description of the subject of the search and seizure fatally overbroad because such left to the discretion of the searching officers what items would be encompassed?

2) Were those facial portions of the search warrant that were not "general warrants" in nature supported by probable cause?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than petitioner. In the court below, there were four defendants, James Pickrel, Joseph Jay Pickrel (petitioner), Marven Ellis Broxson and Danny Lee Endicott. Petitioner and each defendant filed separate appeals in the United States Court of Appeals for the Ninth Circuit. Their cases were subsequently consolidated in that court.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	15
POINTS OF FACT	20
POINTS OF LAW	22
CONCLUSION	44
APPENDIX A: Judgment of Ninth Circuit	App. A
APPENDIX B: Memorandum of Ninth Circuit	App. B
APPENDIX C: Order Denying Rehearing	App. C

TABLE OF AUTHORITIES

CASES	Page
Andresen v. Maryland, 96 S Ct 2737, 2749, n.11, 427 US 463, 49 L Ed2d 627 (1976)	26
Application of Lafayette Academy, Inc., 610 F2d 1 (1st Cir. 1979)	31
Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed2d 564 (1971)	29
Marron v. United States, 275 U.S. 192, 196, 48 S.Ct 74, 76, 72 L.Ed 231 (1927)	30
Stanford v. Texas, 379 U.S. 476, 485, 85 S.Ct. 506, 512, 13 L.Ed.2d 431 (1965)	29
United States v. Blakeney, 942 F2d 1001 (6th Cir. 1991)	30
United States v. Cardwell, 680 F2d 75 (9th Cir. 1982)	~~22,~~25,27
United States v. Christine, 687 F2d 749, 754 (3d Cir. 1982)	36
United States v. Cook, 657 F2d 730, 735 n. 6 (5th Cir. 1981)	30,36
United States v. Crozier, 777 F2d 1376 (9th Cir. 1985)	22,23,25,27,33

United States v. Fannin,
817 F2d 1379 (9th Cir. 1987) 29

United States v. Heldt,
668 F2d 1238 (D.C. Cir. 1981) 25,30

United States v. Leary,
846 F2d 592 (10th Cir. 1988) 30

United States v. Spilotro,
800 F2d 959 (9th Cir. 1986)
22,25,28,29,33,35,36

United States v. Stubbs,
873 F2d 210 (9th Cir. 1989) 23

United States v. Washington,
797 F2d 1461, (9th Cir. 1986) 26,27

United States v. Weber,
915 F2d 1282, (9th Cir. 1990) 23

United States v. Whitten,
706 F2d 1000, 1009 (9th Cir. 1983) 27

U.S. v. Hernandez,
937 F2d 1490, 1494 (9th Cir. 1991) 41

U.S. v. Schmidt, 947 F2d 263,
371-73 (9th Cir. 1991) 41,42

Voss v. Bergsgaard,
774 F2d 402 (10th Cir. 1985) 30

STATUTORY PROVISIONS

Title 28, United States Code, Section 1254 (1)	3
28 U.S.C. Section 1291	4
21 U.S.C. § 841	2,3,23
21 U.S.C. § 846	2,4,23
Federal Rules of Criminal Procedure 2255	16
Oregon Revised Statutes 133.545(3)	40,41
Amendment IV United States Constitution	3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOSEPH JAY PICKREL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Joseph Jay Pickrel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 2, 1992.

OPINION BELOW

On June 2, 1992, the Court of Appeals entered its opinion and judgment affirming the conviction of petitioner for conspiracy to manufacture a controlled substance in violation of 21 U.S.C. §§ 841 and 846. A copy of that opinion is attached as Appendix B. The Ninth Circuit denied the petition for rehearing filed on July 6, 1992, by order dated September 1, 1992. A copy of that order is attached as Appendix C.

JURISDICTION

On October 29, 1990, petitioner conditionally pleaded guilty to conspiracy to manufacture of a controlled substance, methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Judgment was entered on February 20, 1991.

On June 2, 1992, the Court of Appeals issued an opinion affirming the conviction of petitioner for conspiracy to manufacture of a controlled substance, to wit: methamphetamine. A petition for rehearing with a suggestion for rehearing en banc was denied on September 1, 1992. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

a. Amendment IV, Constitution of the United States. The right of the people to be secure in their persons, houses, papers, and effects, gainst unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, support by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841(a)(1) provides:

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

"(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; * * *"

21 U.S.C. §846 provides:

"Any person who attempts or conspires to commit an offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE CASE

The statutory basis for Ninth Circuit jurisdiction was 28 U.S.C. Section 1291.

In early September of 1989 a multi-agency task force began to draw together the information accumulated in an investigation titled "Operation Raccoon." (RT Vol. I, p. 83). Over roughly a two month period, one Detective McLain, of the

Oregon State Police, and William Marshall, of the Douglas County District Attorney's Office, sought to incorporate the fruits of the investigation into an affidavit for search warrant. Approximately 10 drafts of the affidavit were composed. (RT Vol. I p. 87). The three final drafts, in chronological order, together with a proposed search warrant, were submitted to the Honorable William L. Lasswell, a district judge for Douglas County, Oregon. (RT Vol. I p. 116)

On October 22, 1989, in reliance on the last of the three drafts of the affidavit submitted to him, Judge Lasswell signed the search warrant submitted to him. (RT Vol I. p. 93-94).

The search warrant pertinent to this appeal is only one of a large number issued pursuant to the search warrant

affidavit, which numbered 94 pages. The search warrant here directed a search of a dwelling located at 311 Second Street, Riddle, Douglas County, Oregon. The face of the warrant specifically provided as follows:

"THE SUBJECT OF YOUR SEARCH WILL BE:

> "Round bottom flasks, reflex condensers, heating mantles, separatory funnels, drying pans, pressure tanks, aphedrine, red phosphorus, hydrogen gas, phenyl acetic acid, lead acetate, hydrochloric acid, mercuric chloride, aluminum shavings, strong chemical bases, generators, tanks, pumps, containers, scales, packaging materials, records of drug sales or purchases, bank records, cash, precious metals or gems, proof of residency, correspondence, tape recordings including those in answering machines, false identification, false bookkeeping records, records of real astate [sic] purchases in true or false names, records of vehicle purchases, identification and or ownership papers in true or false names, computar [sic] records, computer systems, records of ownership or hidden ownership of businesses or partnerships, fingerprints, photo

albums, diaries, ledgers, marijuana, cocaine, methamphetamine, other controlled substances or other evidence, means or fruits of the crimes of CRIMINAL CONSPIRACY, CRIMINAL RACKETEERING, FACILITATION OF CRIMINAL ACTIVITY, MANUFACTURE OF A CONTROLLED SUBSTANCE, DELIVERY OF A CONTROLLED SUBSTANCE, POSSESSION OF A CONTROLLED SUBSTANCE, OR SMUGGLING ACTIVITY."

The affidavit for search warrant dealt with a number of individuals, vehicles, businesses, and dwellings. Only a very small portion, however, dealt with this defendant, Joseph Pickrel, and the residence at 311 South Second Street, Riddle, Douglas County, Oregon. Because the information is so limited, it is set out verbatim for the court's convenience.

"That on May 8, 1989, I drove by Joseph J. Pickrel's residence, 311 2nd Street, Riddle. That parked on the street in front of Joseph Pickrel's house was the 1977 Chevrolet van, bearing Oregon license PQR 539. That this is the same van that Jimmy Ennis used to pick up the chemicals and equipment in Washington in February, 1989.

"That Detective Urban told me that he talked to Sergeant John Stall, Douglas County Sheriff's Office, and was told that about two or three years ago he used to have a causal [sic] type friendship with Joe Pickrel. That Joe Pickrel lived at 311 2nd Street, Riddle at least since 1983. That during one of their conversations the topic turned to the internal revenue service (I.R.S.). That Joe Pickrel stated that he has not filed an income tax form for several years and is not worried about the I.R.S. finding out as he puts all his assets in other peoples names and has not had a job in about ten years.

"That I spoke with Detective Urban who told me that he contacted Riddle City Hall and learned that on November 17, 1982, Joe Pickrel had the water at 311 2nd Street, Riddle changed from J.J. Duckett's name into his own name.

"That Detective Urban further told me that he contacted the Douglas County Tax Department and learned that a portion of the 1982/83 taxes for 311 2nd Street, Riddle was paid in cash by a Mrs. J.G. Pickrel on November 14, 1983. That on December 13, 1984 the remainder of the 1982/83 as well as the 1983/84 and the 1984/85 taxes were paid in cash presumably by the owner of record, James Larry Duckett. That on March 14, 1986, Elsie Pickrel, 514 Glover Avenue, Chula

Vista, California paid the 1985/86 taxes in cash. That on December 14, 1987, Elsie Pickrel paid in cash the remaining 1986/87 taxes and a portion of the 1987/88 taxes. The remaining 1987/88 taxes and the 1988/89 taxes were paid in cash by James Larry Duckett on November 14, 1988." (Search Warrant Affidavit Pages 31-32)

"* * *

"That on May 10, 1989, I talked to Detective Dave Sceverns, Linn County Sheriff's Office, and was told that on May 9, 1989, he (Sceverns) spoke with a Allan Roy Bolton, DOB: 04/01/55 and that Bolton said that his life is in danger. That Bolton went on to say that on May 9th, in the afternoon he was at Riddle Auto Clinic where he went into a fifth wheel trailer that had a rebel flag over one of the windows. That inside the trailer he saw a AK47 assault rifle, a mac 10 assault weapon and several containers of chemicals for a methamphetamine lab. That the chemicals were in amber colored bottles and white round plastic buckets. That when he left the trailer he was confronted by Joe Pickrel, Jimmy Ennis, and Jerry Broxson. That they threatened to kill him due to his presence in the trailer. That Bolton then left north bound on Interstate 5 in a Dodge pickup going to the Bi Mart store in Albany and subsequently contacted

Detective Sceverns." (Search Warrant Affidavit Page 34).

"* * *

"That in mid-June, 1989, Detective Chris Brown and I spoke to a person who I will hereafter refer to as "C". That "C" told us that Joe Pickrel is the "Al Capone" of the south county and over sees [sic] several "crank" labs. That the crank lab that was "busted" in May, 1989 was not Jim Pickrel's, that it was Joe Pickrel [sic] and that Jim Pickrel was just working for his brother Joe Pickrel. That Jerry and Marv Broxson are just "gofers" and do whatever Joe Pickrel tells them to do. That "C" further said that Scoop Gallagher is the "enforcer" or "muscle man" and oversees all lab operations. That I know Scoop is the nickname for Frank Gallagher. That "C" said that Joe Pickrel's big plan is to build a large white house overlooking Canyonville and it would be on the same hill where the crank lab was busted. That "C" further said that since Joe Pickrel was arrested several years ago that he "protects himself by not touching the dope or by doing any cooking". That "C" knows this information as "C" in the past transported crank for Joe Pickrel and the fact that "C" still "hangs with this crowd" and overhears conservations [sic] between the parties mentioned above. That "C" did not want "C"'s name mentioned as

Joe Pickrel would have "C" killed and we (police) would never find the body. That I know that "C" has given information in the past that resulted in the arrest of one subject on more than one felony charge.

"That I was present on June 26, 1989 at about 10:20pm when Jerry W. Broxson was stopped while driving a 1978 Oldsmobile, Oregon license BPD 054. That on the front seat was a colt, .38 caliber, revolver, with a serial number of PO6534, in a shoulder holster. (That this is the same weapon that was released back to Julie Broxson on May 22, 1989). That a [sic] during a subsequent search of the glove box for additional weapons, a shaving kit type bag was found. That inside this bag was about one and one-half ounces of suspected methamphetamine . That also inside the glove box was a Riddle Auto Clinic receipt dated March 30, 1989 for repairs made on this vehicle. The receipt was made out to Joe Pickrel, 2nd Street, Riddle. That in the ashtray was two receipts, dated June 27, from Canyonville Justice Court and were made out to J. Broxson. That Jerry Broxson told me that the vehicle was a rental from Riddle Auto Clinic.

"* * *

"That I checked the sheriff's office records and located a theft report, case number 89-2056, dated May 8,

1989, that showed Joseph J. Pickrel, DOB: 07/12/50, giving his address as 311 2nd Street, Riddle and that his telephone number is 874-3241." (See Search Warrant Affidavit Pages 42-44)

"* * *

"That while conducting the search of the Kading residence, Detective Urban told me that he saw a telephone bill dated February 11, 1989 to Kelly Kading, 12 SW Berry Lane, Roseburg. That it listed her telephone number as being 679-7187. That upon examining the bill I noted that on February 1, 1989 her telephone was used to call 874-3241. As noted above this is the telephone number of Joseph J. Pickrel." (See Search Warrant Affidavit Page 45).

"* * *

"That on July 21, 1989, I talked to Deputy Joe Perkins, Douglas County Sheriff's Office, and was told that at 4:42 p.m. he drove by Joseph J. Pickrel's house, 311 2nd Street, Riddle and parked out front was a 1968 Chevrolet El Camino, black in color, Oregon license FRH 534 and that it was towing a fancy ski boat. That Detective Urban told me that he caused a check to be made with Department of Motor Vehicles and learned that the vehicle is registered to a Kenneth Earl Hause, DOB: 05/12/57. That Carol Hansen, receptionist at the Sheriff's Office

> - Riddle sub station, told Deputy Perkins that she knows Joseph Pickrel and that at about 3:15pm on this date she saw Joe Pickrel talking to a man in the above mentioned black El Camino." (See Search Warrant Affidavit Page 50).

The affidavit was not incorporated into the search warrant, by reference or otherwise.

The search warrant was served upon the residence at 311 Second Street, Riddle, Oregon. Evidence was seized which was then utilized to prosecute the defendant, Joseph Pickrel. In defense, the defendant asserted four basic contentions:

1. The Indictment did not state an offense for the reason that methamphetamine was not lawfully designated a controlled substance;

2. The search warrant was not issued by a "neutral and detached magistrate" as constitutionally required;

3. The search warrant was facially defective and invalid because it failed to adequately particularize the items to be the subject of search and seizure at the dwelling, but instead used broad, ambiguous language causing the same to constitute a general warrant;

4. The affidavit for search warrant, as it pertains to Joseph Pickrel and the residence at 311 Second Street, fails to provide probable cause to search for a substantial number of the items designated as the subject of search and seizure in the warrant.

The court conducted a hearing on the defendant's motions, which included the taking of evidence and argument as well as

memorandums dealing with pertinent portions of the affidavit specifically selected by the court, i.e., the standard for evaluating whether or not a magistrate is "neutral and detached," and the effect of a failure to adequately particularize the subject matter of the search warrant. (ER 170)

The court denied both of the defendant's motions. Subsequently, the defendant, Joseph Pickrel, entered his conditional plea to Count 1 of the Superseding Indictment reserving the right to appeal the above enumerated motions.

The Court of Appeals affirmed the conviction and denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

Chagrin, dismay and consternation are the product of the court's disposition of

the issues in this matter. It would appear that the court felt inundated by what the court perceived as an overabundance of issues raised at trial level contributed by the combined codefendants. (App B, p. 4, Note 1)

Generally, the litigation of all the existing issues at trial level is applauded because it forestalls such issues arising pursuant to a motion under FRCP 2255 and a claim of ineffective assistance of counsel. Regardless of the number of issues raised at the trial level, defendant Joseph Pickrel raised only two issues on appeal and abandoned all others (Appellant's Brief, page 1). The first issue was not argued orally and was acknowledged to have been resolved by decision of this circuit by the time of oral argument. Such issue, it was

acknowledged, was preserved only for the remote possibility that certiorari might be granted on any such decision.

The only viable issue before the Court of Appeals, the validity of the search warrant served on the defendant's residence, was sought to be presented on two succinct bases: (1) a substantial portion of the facial description of the subject of the search and seizure was fatally overbroad because such left to the discretion of searching officers what item would be encompassed, e.g. "means or fruits of the crimes of criminal conspiracy, criminal racketeering, facilitation of criminal activity. . ."; and (2) those facial portions of the search warrant that were not "general warrants" in nature were not supported by probable cause, e.g. for "methamphetamine". In that connection the court was directed to the specific portion

of the search warrant affidavit that declared:

> "That "C" further said that since Joe Pickrel was arrested several years ago that he "protects himself by <u>not touching the dope or by doing any cooking</u>." (emphasis added) (Appellant's Brief, page 24)

Applying the requisite common sense meaning to this information means defendant Joseph Pickrel does not allow the drugs or the accoutrements thereof to be around or connected to him.

The Court of Appeals specifically declined to examine or rule on the government's assertion that the overbreadth issue was moot[1] or that the

---

[1]The government sought to contend that only "admissible" evidence was seized. In essence, the government sought severance of the various items named in the warrant and to claim, somehow, that the scope of the search conducted was limited to such items. (Government's Brief, page 23).

officers acted in good faith (App B, p.7, note 2).

Neither did the trial court remove or sever any portion of the warrant's description of the subject of search and seizure from the remainder.

The result is both trial and appellate court approval, without limitation, of a search warrant that facially authorizes the officers serving the same to conduct a search limited in essence to whatever such officers perceive to be the parameters imposed in searching for "evidence, means or fruits of the crime of criminal conspiracy, criminal racketeering, [or] facilitation of criminal activity. . . ." Counsel respectfully suggests that the warrant could as well have authorized search for "evidence of crime" without enlarging or

changing the scope of the search and seizure sanctioned thereby.

Thus the Court of Appeals decision *has so far departed from the accepted* requirements of search warrants as to require the exercise of this Court's power of supervision.

POINTS OF FACT

Though set out in defendant Joseph Pickrel's brief (Appellant's Brief, page 6, 24), the Court of Appeals was not adequately made aware that the only information connecting defendant Joseph Pickrel to the methamphetamine conspiracy was from informant "C", who declared:

". . . since Joe Pickrel was arrested several years ago that he 'protects himself by not touching the dope or by doing any cooking.'" (Ibid.)

The "reasonable and common sense" meaning to this statement, in context, is that defendant Joseph Pickrel does not have methamphetamine around him, nor does he have the apparatus, or chemicals, to manufacture the same.

The rest of the affidavit, at best, establishes a methamphetamine conspiracy and connects Mr. Pickrel to the same. But nothing else connects Mr. Pickrel to "methamphetamine" or "cooking" differently or in addition to what was provided by informant "C".

2) The affiant himself admitted there was nothing in the affidavit to support the warrant's direction to search for:

a) "marijuana"

b) "cocaine"

c) "controlled substances" other than methamphetamine.

d) "smuggling" evidence (RT Vol II, 92-97)

Such deficiency was also documented in defendant's brief (Appellant's Brief, pages 21-24).

It is difficult to conceive how a deficiency by omission could be demonstrated more pointedly than by the admissions of the very affiant who created the affidavit.

POINTS OF LAW

The law concerning the lack of particularity in search warrants may be summarized fairly succinctly. The court will not uphold warrants that are overbroad. United States v. Spilotro, 800 F2d 959 (9th Cir. 1986). Also, see United States v. Cardwell, 680 F2d 75 (9th Cir. 1982); United States v. Crozier, 777 F2d 1376 (9th Cir. 1985). The Crozier case very closely resembles some of what the

court is reviewing here. In that case the relevant language in the search warrant authorized the seizure of "Material evidence of violation of 21 U.S.C. 841, 846 (Manufacturing and Possession with Intent to Distribute Methamphetamine and Conspiracy)," United States v. Crozier, supra, at 1381.

Regarding the warrant, the court stated:

> "The search warrant for the Stein residence authorizes a general search for evidence of an amphetamine business. This warrant is overbroad and violates the Fourth Amendment." Ibid 1381

To the same effect is United States v. Stubbs, 873 F2d 210 (9th Cir. 1989) and United States v. Weber, 915 F2d 1282, (9th Cir. 1990).

The instant warrant and its terms may be divided into three parts. The first deals with language that is patently

overbroad. That language consists of the following:

> "tape recordings, including those in answering machines, ... fingerprints, photo albums, diaries, ledgers, ... other controlled substances, or other evidence, means or fruits of the crimes of [CRIMINAL CONSPIRACY, CRIMINAL RACKETEERING, FACILITATION OF CRIMINAL ACTIVITY, MANUFACTURE OF A CONTROLLED SUBSTANCE, DELIVERY OF A CONTROLLED SUBSTANCE, POSSESSION OF A CONTROLLED SUBSTANCE, OR SMUGGLING ACTIVITY.]" (emphasis added)

This language is not subject to any limitations set out in the search warrant. The fingerprints are not related to any particular person or subject matter. The photo albums, diaries, ledgers, are subject to no limitation either. Such limitation could have dealt with a relevant time; or, could have dealt with their tendency to reveal drug trafficking or manufacturing. However, such was not done. Such open language has been condemned, as previously noted.

That section of the search warrant that then deals with the "other evidence, means or fruits" of a large number of crimes which are set out by name only, and are referred to in only a generic way, is patently overbroad per se. Such language is functionally equivalent to the citing of criminal statutes. That practice has been condemned. United States v. Spilotro, supra; United States v. Cardwell, supra; and, United States v. Crozier, supra.

One court has recognized such a situation as "particularly acute here because document searches, unlike searches for other tangibles, 'tend to involve broad disclosures of the intimacies of private lives, thoughts and transactions.'" United States v. Heldt, 668 F2d 1238 (D.C. Cir. 1981) cited with

approval in United States v. Washington, 797 F2d 1461, (9th Cir. 1986). The Supreme Court has voiced the same concerns:

> "We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized...[R]esponsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy." Andresen v. Maryland, 96 S Ct 2737, 2749, n.11, 427 US 463, 49 L Ed2d 627 (1976).

Other items also appear to have been condemned by the Ninth Circuit holdings, e.g., "tape recordings...computer records, computer systems,...photo albums, diaries, ledgers,..."

> "While a warrant authorizing seizure of any photographs or diaries might have been unreasonable, here the scope of those words was qualified by the accompanying language 'indicating the ownership or occupancy of said residence.'" (Emphasis added). United States v. Whitten, 706 F2d 1000, 1009 (9th Cir. 1983).

Failure to provide sufficient particularity in a search warrant may vitiate all or part of a search warrant. United States v. Cardwell, supra; United States v. Washington, supra; United States v. Crozier, supra. In determining the sufficiency of the specification of items in a search warrant, the courts have declared that they will consider "the totality of the circumstances." United States v. Cardwell, supra, at 78.

A similar declaration was made subsequently in the following terms:

> "The specificity required in a warrant varies depending on the circumstances of the case and the type of items involved. Warrants

which describe generic categories of items are not necessarily invalid if a more precise description of the items subject to seizure is not possible. See United States v. Cardwell, 680 F2d 75, 78 (9th Cir. 1982). In determining whether a description is sufficiently precise, we have concentrated on one or more of the following: (1) whether probable cause exists to seize all items of a particular type described in the warrant, see e.g., McClintock, 748 F2d at 1283; United States v. Offices Known as 50 State-Distributing Co., 708 F2d 1371, 1374 (9th Cir. 1983), cert. denied, 465 US 1021, 104 S Ct 1272, 79 L Ed2d 677 (1984); (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, see, e.g., United States v. Pollock, 726 F2d 1456, 1466 (9th Cir. 1984); Gomez-Soto, 723 F2d at 653-54; Cardwell, 680 F2d at 78; Hillyard, 677 F2d at 1340; and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued, see e.g., Cardwell, 680 F2d at 78; Hillyard, 677 F2d at 1339-40. Accord United States v. Cortellesso, 601 F2d 28, 32 (1st Cir. 1979), cert. denied, 444 US 1072, 100 S Ct 1016, 62 L Ed2d 753 (1980)." United States v. Spilotro, 800 F2d 959 (9th Cir. 1986)

The Spilotro, case was approved and followed in United States v. Fannin, 817 F2d 1379 (9th Cir. 1987), though the court in the Fannin case found that the necessary particularity had been achieved.

The Court of Appeals decision in this case does more than depart frcm Ninth Circuit precedent. It gives no noticeable consideration to the most basic underpinnings on the limits of search warrants as explained by the Supreme Court in Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed2d 564 (1971) (the problem to be avoided is "not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings."), and Stanford v. Texas, 379 U.S. 476, 485, 85 S.Ct. 506, 512, 13 L.Ed.2d 431 (1965) ("'As to what is taken, nothing is left to the

discretion of the officer executing the warrant.'" quoting Marron v. United States, 275 U.S. 192, 196, 48 S.Ct 74, 76, 72 L.Ed 231 (1927). The opinion in this case is also inconsistent with other circuits, See, for example, United States v. Blakeney, 942 F2d 1001 (6th Cir. 1991) ("jewelry insufficient where inventory is available of what was taken in jewelry store robbery); United States v. Leary, 846 F2d 592 (10th Cir. 1988) (affidavit description insufficient because government had the information to make description more particular); Voss v. Bergsgaard, 774 F2d 402 (10th Cir. 1985) (Warrant authorizing search for information pertaining to any federal crime overbroad); United States v. Heldt, supra; United States v. Cook, 657 F2d 730 (5th Cir. 1981) (warrant description

insufficient when government could have made more particular); Application of Lafayette Academy, Inc., 610 F2d 1 (1st Cir. 1979) (description of educational institution's records connected with fraud insufficient where there is no time frame reference or description of nature of fraud.).

Even the affiant, Detective McLain, acknowledged and agreed in his testimony that there was no factual foundation for a substantial number of the items set out in the search warrant. (RT Vol II, p.92-97)

The second portion of the affidavit itemizes specific types of items for which to search, i.e, "round bottom flasks, reflex condensers, heating mantles, separatory funnels, drying pans, pressure tanks, aphedrine, red phosphorus, hydrogen gas, phenyl acetic acid, lead acetate,

hydrochloric acid, mercuric chloride, aluminum shavings, strong chemical bases, generators, tanks, pumps, containers, scales, packaging materials, ...". All of these items clearly have to do with manufacturing and packaging. But the affidavit asserts:

> "That 'C' further said that since Joe Pickrel was arrested several years ago that he 'protects himself by not touching the dope or by doing any cooking.'"

Existence and cognizance of this portion of the information was acknowledged by the affiant, Detective McLain in his testimony. (RT Vol II. p. 77). Consequently, there is no probable cause to believe that Joseph Pickrel would have methamphetamine at his residence nor that he would have the implements for manufacturing, i.e., "cooking" or for

packaging. The probable cause is to the contrary.

The courts have generally recognized that the terms of the warrant specifying what may be seized are severable. Therefore, if the warrant does describe with sufficient particularity some items, but others are overbroad, the warrant is not totally invalid. However, the scope of the search is limited to the valid portions. Furthermore, items seized that are outside the scope of the valid terms of the warrant, will be suppressed. United States v. Crozier, supra; United States v. Spilotro, supra.

From the foregoing, the defendant submits that the two sections of the search warrant which have been described above are overbroad, in the one instance, and totally devoid of probable cause in

the other. We are led then to the consideration of the remaining portion of the search warrant. That language would consist of the following:

> "...records of drug sales or purchases, bank records, cash, precious metals or gems, proof of residency, correspondence, false identification, false bookkeeping records, records of real estate purchases in true or false names, computer records, computer systems, records of ownership or hidden ownership of businesses or partnerships..."

At the outset it is apparent that there is no time limitation on when these records may have been created. Neither is there any limitation such as a connection with methamphetamine. The same is true regarding the other items. It is a broad unlimited type of direction regarding the scope of the search. Moreover, there is no limitation that the same be, in anyway, connected with Joseph Pickrel or any other

person with whom the search warrant affidavit deals. It is essentially unlimited in scope.

The directive regarding false records, and purchases in false names, are also less than specific. The problem confronting the police officer, whereby he is to determine whether or not something is listed in a false name is insurmountable.

Consequently, many portions of the directives of the affidavit would appear to come well within the overbroad characterization. Very little even have some superficial appearance of specificity. They fall within the rule and findings as laid down in United States v. Spilotro, supra. In that case there were overbroad and general provisions, as here, but the warrants contained some

request for specific items, e.g., scanning devices, cash, and keys for safe deposit boxes. The Court reviewed the government's request that these items be severed and ruled as follows:

> "In some cases we might be persuaded to say that, given the difficulty of describing such items with more particularity, the description used would be sufficient, absent, say, information from an inside source designating key numbers or currency denominations. Here, however, the cash and keys sought were not related in the warrant to specific crimes, but rather were only a relatively insignificant part of the sweeping search for evidence of any violation of the thirteen statutes. In this context the cash and safe deposit keys are not sufficiently separable from the rest of the warrant to allow severance. See: United States v. Christine, 687 F2d 749, 754 (3d Cir. 1982); United States v. Cook, 657 F2d 730, 735 n. 6 (5th Cir. 1981)." United States v. Spilotro, supra, at 967.

Another difficulty confronts the government in sustaining the search at 311

Second Street even if the Court were to find, as the government contended at trial level[2], that there was a search for items other than methamphetamine and cooking apparatus.

Inferentially, the government conceded that probable cause to search for methamphetamine and the apparatus to "cook it" may not have been set out within the affidavit. But if the government is going to rely upon some kind of "plain view" discovery or "plain view" seizure, it is

---

[2]"Defendant argues that because 'C' states defendant has insulated himself by not 'cooking' meth and not 'touching' it, this negates the probability of evidence at defendant's house. However, Detective McLain was specifically searching for more than just narcotics. See the attached copy of the warrant itself, marked exhibit K and incorporated herein. At p. 1-12, Detective McLain sets forth the basis for why he believes evidence will be found at defendant's residence."

--government's memorandum page 31

incumbent upon the government to prove the same. There was no evidence adduced establishing that the search for and the seizure of the methamphetamine, as well as the other items that lie outside the valid scope of the warrant, were inadvertently discovered and seized.[3]

"Good-faith," to provide an exception to the necessity that a search warrant be valid and based upon probable cause, must be generated from objective reasonableness. Affiant McLain's presentation of this search warrant to

---

[3]In fact, as pointed out to the district court in the final brief, the search was commenced by utilizing a drug alerting dog and then follow-up searching was done at the various places where the dog alerted (The police report was included as an exhibit.) Clearly, the search was for drugs specifically, and was not designed to search solely for something the court conceivably might find was specifically described and for which there was probable cause.

Judge Lasswell is in no conceivable way objectively reasonable. He admits requesting the right to search for items and evidence that were not supported by any factual basis in the affidavit. His treatment of the preparation of the facts supporting probable cause is equally illustrative. His handling of information from two key informants, i.e., Bolton, through Deputy Severns, and "C" ranges from pathetic to malevolent. (RT Vol. II p. 65-87)

It is also patently evident from McLain's testimony, as well as District Attorney Marshall's, that there were no pressing time constraints. (RT Vol. I. p. 95, Vol. II p. 79-80). Preparation of the final affidavit occurred over a period of roughly two months. (RT Vol. I p. 95). Furthermore, means were available to both

check and corroborate the substance and accuracy of what was being transmitted.

Finally, another aspect is deserved of comment. This was a task force type operation, specifically, "Operation Raccoon." Deputy District Attorney Marshall was part of this task force working with the law enforcement. (RT Vol. I p. 122-123). He was acting as an advocate, not as some kind of objective legal adviser. (RT Vol. I p. 91). The affidavits, in draft form, were prepared and the final drafts submitted without the existence of any exigent circumstances. (RT Vol. I p. 95). The affidavit was obtained pursuant to the law of the State of Oregon. Pursuant to that law, it could as well have been obtained by Deputy District Attorney Marshall, as the affiant, as by Detective McLain. ORS

133.545(3). In these circumstances, it is no more a demonstration of "objective reasonableness" for Deputy District Attorney Marshall and Detective McLain to rely upon such a search warrant and such affidavit information together than if when one had done it separately. Prosecutors should not be immune from deterrence.

There is nothing in the holding of the case cited by the Court of Appeals in this case, U.S. v. Hernandez, 937 F2d 1490, 1494 (9th Cir. 1991), that supports the inclusion in a search warrant of named items regarding which the affidavit is totally devoid of probable cause, especially when the same is acknowledged by the affiant.

Neither does U.S. v. Schmidt, 947 F2d 263, 371-73 (9th Cir. 1991), cited in the

Court of Appeals Opinion in this case, support search warrant language having no greater particularity than "evidence, means or fruits of the crimes of . . . facilitation of criminal activity. . ."

From all that appears in the record, the scope of both the search conducted and the evidence seized was restricted only to the limits of the above authorization. Such a limitation is improperly bounded only by the initiative, innovation and energy of the searching officer. A "severance" procedure should, at minimum have been utilized regarding the overbroad language.

Moreover, Schmidt, provides a three point analysis which supports defendant's position:

a) was there probable cause to seize all items of the type named?

b) were there objective standards for officers to differentiate items seizable?

c) could the government or prosecutor describe the items with more particularity in light of information they had available?

Here the search warrant was overbroad and there was no probable cause to seize the items named, e.g. methamphetamine, because police could not expect to find them at defendant's residence. There were no objective standards to allow officers to differentiate items seizable because the warrant contained overbroad "catch-all" language that left entirely to police discretion what items were subject to seizure. Finally, either the prosecutor could have described items sought with more particularity or there was no probable cause for those items and they should not have been included whatsoever.

CONCLUSION

For all the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

DATED this 11th day of December, 1992.

Respectfully submitted,

Shaun S. McCrea

Shaun S. McCrea
McCREA, P.C.
1147 High Street
Eugene, OR 97401-3270
(503) 485-1182

Of Attorneys for Petitioner,
Joseph Jay Pickrel

JUDGMENT

SEP 15 1992
MANDATE ISSUED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-30062
CT/AG#: CR-90-60026-1-REJ

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JOSEPH JAY PICKREL

Defendant-Appellant

APPEAL FROM the United States District Court for the District of Oregon (Eugene).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Eugene) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and Entered: June 2, 1992

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSEPH JAY PICKREL, Defendant-Appellant.	)	No. 91-30062 D.C. No. CR-90-60026-1-REJ
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES PICKREL, Defendant-Appellant.	)	No. 91-30064 D.C. No. CR-90-60026-2-REJ
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARVEN ELLIS BROXSON, Defendant-Appellant.	)	No. 91-30066 D.C. No. CR-90-60026-3-REJ
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DANNY LEE ENDICOTT, Defendant-Appellant.	)	No. 91-30304 D.C. No. CR-90-60026-4-REJ MEMORANDUM*

* This disposition is not suitable for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court for the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted March 6, 1992 **
Portland, Oregon

Before: HALL, O'SCANNLAN, and LEAVY, Circuit Judges

Joseph Pickrel, James Pickrel, Marven Broxson, and Danny Endicott were arrested and charged with various crimes relating to the manufacture, possession, and distribution of methamphetamine. In exchange for the government's promise to recommend leniency at sentencing, Endicott agreed to testify against his coconspirators and pleaded guilty to one count of conspiring to manufacture methamphetamine, for which he received a sentence of probation. Shortly thereafter, Endicott's three codefendants

---

** Submitted on the briefs and records as to No. 91-30304 only. Fed R. App. P.34(a) and Ninth Circuit Rule 34-4.

entered conditional guilty pleas to one count each of conspiring to manufacture and distribute methamphetamine, for which they received substantial prison sentences. Endicott's probation was later revoked and he also was sentenced to prison.

On appeal the defendants have raised a host of issues, arguing, inter alia, that the district court erred by holding that methamphetamine is a controlled substance, by denying motions to suppress evidence seized as the result of unlawful searches, and by imposing unlawful sentences. We affirm the convictions and uphold the sentences.[1]

---

[1] By our count the appellants have raised at least fourteen separate and distinct issues in this consolidated appeal, a total that does not include issues arising out of motions originally presented by one defendant and joined in by one or more codefendants. In lights

I. 91-30062 - Joseph Pickrel

The gist of Joseph Pickrel's first argument is that, because methamphetamine is a lawful ingredient of certain over-the-counter drugs, he should not have been subjected to prosecution of the unlawful manufacture and distribution of a controlled substance. We have repeatedly rejected this argument. See, e.g., United States v. Housley, 955 F.2d 622, 623 (9th Cir. 1992) (per curiam); United States v. Durham, 941 F.2d 886, 889-90 (9th Cir. 1991); United States v. Caperell, 938 F.2d 975, 978-79 (9th Cir. 1991).

Joseph Pickrel next argues that the so-called 311 Riddle search was invalid because the authorities lacked probable

---

of this overlap, and because we find no merit to any of the appellant's arguments, we decline to discuss the specifics of every issue raised by each appellant.

cause therefor. We disagree. The lengthy affidavit in support of the search warrant sets out in detail the long train of facts leading to the authorities' suspicion of his activities. Moreover, Pickrel does not clearly identify what, if any, misstatements or omissions in the affidavit show a lack of "a substantial basis for [the magistrate's] conclu[sion] that the affidavit in support of the warrant established probable cause." See United States v. Hernandez, 937 F.2d 1490, 1494 (9th Cir. 1991) (per curiam). Accordingly, it cannot be said that there was no substantial basis for the magistrate's determination that the affidavit established probable cause for the issuance of the 311 Riddle search warrant.

Joseph Pickrel also contends that the

search warrant's listing of property subject to search and seizure was overbroad, and this defect could not be cured because the authorities failed to act in good faith. On the contrary, the warrant plainly identifies the premises to be searched, and goes to great lengths to specify the subject matter of the search. The search warrant does not suffer from terminal overbreadth.[2] See United States v. Schmidt, 947 F.2d 362, 371-73 (9th Cir. 1991).

II. 91-30064 - James Pickrel

James Pickrel's initial argument is

---

[2] By holding as we do, we need not and do not reach the merits of the appellant's argument that the executing officers lacked good faith, nor of the government's contentions that (1) the overbreadth issue is moot because only admissible evidence was seized, (2) the warrant was not overbroad in any event, and (3) the officers acted in good faith.

that the first search warrant executed at his Tiller Trail residence was overbroad because it authorized the executing officers to search "any vehicles" on the premises. We reject this contention. Detective McLain's affidavit pointed out, inter alia, that individuals involved in the illegal manufacture of methamphetamine often transport the drugs using whatever vehicles may be on hand, that both James Pickrel and a pick-up truck, subsequently identified as belonging to him, had been observed at a rural drug lab, and that the truck reeked of methamphetamine. The district court did not err on this point.

James Pickrel's argument that the executing officers exceeded the scope of their search warrant, which only authorized them to search the Tiller Trail residence, is equally meritless. Although

the district court held that the term "residence" did not include "outbuildings", the judge went on to note that the warrant authorized the search of any "vehicles" found on the property. The outbuilding in question contained the appellant's truck and a horse trailer, both of which unquestionably qualified as "vehicles". Indeed, to hold as the appellant urges would require "residence" and "vehicles" to be read in such strict conjunction that, practically speaking, only a vehicle found inside the residence would be subject to search. There was no error on this point.

James Pickrel contends that no probable cause existed to support the second search of his residence because, inter alia, the search warrant's supporting affidavit contained no new

information regarding the appellant's criminal activities subsequent to the initial search. Although it is a close question, the affidavit does contain information obtained after the first search, information which ties him to the methamphetamine ring.

In addition, the affidavit discusses both the length of time in which evidence of drug trafficking may remain at a location, and that such evidence is likely to be found in, e.g., homes, businesses and cars. This is less a problem of staleness, as argued by the parties, than it is a question of an ongoing activity. Cf. United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir. 1986) ("With respect to drug trafficking, probable cause may continue for several weeks, if not months, of the last reported instance

of suspect activity"). In light of these considerations, the district court's finding of probable cause was not erroneous.

James Pickrel next argues that the second Tiller Trail search warrant was overbroad, due to a lack of sufficient particularity. With the exception of the identification of the place to be searched, the language of the so-called Tiller Trail II warrant is virtually identical to that of the 311 Riddle warrant unsuccessfully challenged by Joseph Pickrel. Accordingly, and for the reasons already set forth above, this contention must fail.

James Pickrel's argument that the evidence admitted against him was obtained in violation of state law must also be rejected. See United States v. Chavez-

Vernaza, 844 F.2d 1368, 1373 (9th Cir. 1988) (as amended) ("[T]he admissibility of evidence in federal court is governed by federal rather than state standards"). Accord, United States v. Davis, 932 F.2d 752, 758 (9th Cir. 1991) ([T]he validity of a search conducted by state law enforcement officers is ultimately a question of federal law").

III. 91-30066 - Marven Broxson

Marven Broxson argues, inter alia, that the district court erred by denying him a four-point reduction in the calculation of his offense level, based on Broxson's contention that he was only a minimal participant in the conspiracy to manufacture and distribute methamphetamine. We disagree.

A defendant's offense level may be decreased by four levels "[i]f the

defendant was a minimal participant in [the] criminal activity". U.S.S.G. § 3B1.2(a) (Nov. 1990). Examples of minimal participation would be "someone who played no other role in a very large drug smuggling operation than to offload part of a single [drug] shipment, or . . . an individual . . . recruited as a courier for a single smuggling transaction involving a small amount of drugs." Id., comment. (n.2).

The record shows that Broxson's degree of involvement in the drug ring was both continuous and long-term, and considerably more extensive than either of the two examples cited. Accordingly, his participation in the offense charged cannot be characterized as minimal. Cf. United States v. Deeb, 944 F.2d 545, 547-48 (9th Cir. 1991) (record did not support

defendant's contention that his ignorance and low-level participation in crime charged entitled him to reduction of offense level), cert. denied, 112 S. Ct. 1597 (1992).

Broxson also contends that he did not know about the quantity of drugs seized at James Pickrel's residence, and this ignorance bars him from being held accountable for the full amount of drugs involved in the conspiracy. We reject this argument.[3]

"If a defendant is convicted of a conspiracy . . . involving a controlled substance, the offense level shall be the

---

[3] By reaching the merits of this argument, we necessarily decline to discuss the government's contention that Broxson lacks standing to challenge the searches of either James or Joseph Pickrel's residence on the ground of a lack of any privacy expectation on Broxson's part.

same as if the object of the conspiracy . . . had been completed." U.S.S.G. § 2D1.4 (Nov. 1990). Illustration e to U.S.S.G. § 1B1.3, comment. (n.1), which is applicable to section 2D1.4, provides an example of the kind of situation in which a defendant convicted of a drug conspiracy should not be held accountable for the full extent of that conspiracy's activities. The record shows that Broxson's involvement in the facts of this case goes well beyond that kind of limited activity. Accordingly, the district court did not err by holding him accountable for the full amount of the methamphetamine involved in the conspiracy. See United States v. Aichele, 941 F.2d 761, 766 (9th Cir. 1991). Cf. United States v. Johnson, 956 F.2d 894, 906-907 (9th Cir. 1992) (applying limitation of U.S.S.G. § 1B1.3,

comment. (n.1), to minor participant in conspiracy who was in police custody at time of subsequent acts of coconspirators).

IV. 91-30304 - Danny Endicott

Danny Endicott first argues that, by virtue of the court having granted the government's initial request for a downward departure pursuant to U.S.S.G. § 5K1.1, the sentence subsequently imposed (viz., for probation violation) was excessive. We disagree.

The district court originally sentenced Endicott to a period of probation subject to conditions mandated by 18 U.S.C. § 3563(a)(3). However, whenever a defendant so sentenced "is [subsequently] found by the court to be in possession of a controlled substance, thereby violating the condition imposed by

section 3563(a)(d), the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence." 18 U.S.C. § 3565(a) (emphasis added).

We recently held that a defendant who violated his probation by possessing methamphetamine was subject to resentencing to prison for a period of not less than one-third of the amount of his probationary term, i.e., "original sentence" under section 3565(a) means the period of probation to which the court actually sentenced the defendant, and not the amount of time to which the defendant originally could have been imprisoned under the Sentencing Guidelines. United States v. Corpuz, 953 F.2d 526, 529 (9th Cir. 1992) (defendant, originally sentenced to three years' probation

instead of prison, resentenced to one year in prison, i.e., one-third of the probationary term). Because Endicott's four-year prison sentence is "not less than one-third of the original sentence" of five years' probation, the district court did not err in ruling as it did.[4] See id.

Endicott's argument that the district court improperly weighed conduct outside the scope of the order to show cause is equally meritless. The show cause order placed him on notice that he had violated

---

[4] Even viewed as an upward departure, however, the sentence imposed was not unlawful: the district court had the authority to act as it did, there was no clear error in its findings supporting the existence of the relevant circumstances (viz., that Endicott had possessed methamphetamine while on probation), and the extent of the departure was reasonable. See United States v. Pascucci, 943 F.2d 1032, 1038 (9th Cir. 1991).

a condition of his probation; he consented to the search of his vehicle which revealed both methamphetamine and a substance to mask the presence of methamphetamine in urine; he does not dispute the fact that his urinalysis tests indicated the presence of methamphetamine; he admitted to the arresting officers that he had been purchasing and using methamphetamine within a month of his release on probation the previous year; and he admitted in open court to possessing and using methamphetamine.

In light of these considerations, the district court's finding that "there's possession for use, but not for distribution" as a ground for revoking probation was not clearly erroneous. For these same reasons, we also find that the evidence was sufficient to show that

Endicott violated a condition of his probation by possessing and using methamphetamine. Because we find no merit to any of the appellants' remaining arguments, the convictions and sentences appealed from are all AFFIRMED.

FILED
SEP -1 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 91-30062
v.	)	D.C. No. CR-90-60026-1-REJ
JOSEPH JAY PICKREL, Defendant-Appellant.	)	ORDER

BEFORE: HALL, O'SCANNLAN, and LEAVY, Circuit Judges

The panel has voted to deny Joseph Jay Pickrel's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.